BANK BUMIPUTRA (M) BHD.

v.

KUCHING PLAZA SDN. BHD. & ORS.

HIGH COURT SABAH & SARAWAK, KUCHING
HAIDAR MOHD. NOOR J
[ORIGINATING SUMMONS NO. KG. 226 OF 1987]
4 JULY 1990

LAND LAW: *Charge - Registered - Outstanding debt - Indefeasibility - Order for sale - Section 148 National Land Code 1965 - Subsequent interests of purchasers - Actual fraud - Proof beyond reasonable doubt - Onus of proof.*

The 1st defendant obtained a bridging loan of RM5 million from the plaintiff for the purpose of constructing and completing a shopping centre called Kuching Plaza. The 1st defendant charged the land to the plaintiff; this charge was duly registered. As a result of an outstanding debt of RM1.5 million and the 1st defendant's failure to respond to a written notice of demand, the plaintiff commenced proceedings for an order for sale of the said land under s. 148(2) of the National Land Code (LC). Before the hearing the 2nd, 3rd, 4th and 5th defendants, as purchasers of some of the lots the subject of this case, intervened.

The issue for the Court was whether an order for sale should be made taking into account the claim of the 2nd to 5th defendants and their interests as purchasers.

Held:

[1] It is clearly established in law that upon registration of a charge the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land.

[2] The onus is upon the defendants to prove beyond reasonable doubt that there was fraud and the Court must be satisfied that the circumstances in which the plaintiff obtained registration of the charge was such that they constituted actual fraud, not constructive nor equitable fraud.

[3] In this case, the charge was registered some time before the purchasers of the lots in question by the 2nd and 5th defendants. As such, there was no actual fraud.

[Order for sale made.]

Cases referred to:

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors [1983] CLJ (Rep) 387
Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Anor. [1989] 1 CLJ (Rep) 1

Legislation referred to:

National Land Code 1965, ss. 148(2), 340
Land Code (Cap 81) (Sarawak), s. 132

For the plaintiff - Walter Dior; M/s. Dior & Co.
For the 1st defendant - Cheng Yi, Matthew Chan; M/s. Matthew T.K. Chan & Co.
For the 2nd to 5th defendants - David Sio; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Haidar Mohd. Noor J:

The plaintiff, Bank Bumiputra Malaysia Berhad, filed this originating summons on 29 September 1987 for an order for sale under s. 148(2) of the National Land Code (Cap 81) of the 1st defendant's land known as Lot 16 Section 30, Kuching Town Land District ("the land"). So far only the basement car park and the shopping podium covering four floors of shopping arcades have been built on the land. The tower block on top of the podium has yet to be built presumably on the ground that the 1st defendant had difficulties in servicing the bridging loan given by the plaintiff and in view of the legal action taken against it by the plaintiff. The complex that has been put up thus far is called "Kuching Plaza".

For the purpose of constructing and completing Kuching Plaza, the 1st defendant obtained a bridging loan of RM5 million from the plaintiff. Towards this end the 1st defendant charged the land to the plaintiff and executed a memorandum of charge under instrument No. L.10145/1979 on 13 September 1970 (see Exhibit 'A') and duly registered it at the Kuching Land Registry on 10 October 1979. As at 30 December 1986 there was an outstanding debt of RM1,531,858.86 with interest chargeable at 14.75% per annum. After there was no response from the 1st defendant to the written notice dated 14 January 1987 (see Exhibit 'B') demanding payment of the outstanding debt, the plaintiff subsequently issued a statutory notice pursuant to s. 148 of the National Land Code (see Exhibit 'C'). As the outstanding debt still remained unpaid, the plaintiff filed this originating summons.

Before the hearing of this originating summons, the 2nd to 5th defendants filed an application to intervene, as purchasers of private Lots 143, 144 and 236. Their application was allowed by me on 14 February 1989 and this originating summons was amended accordingly. Even at the time of hearing of this amended originating summons, it is to be observed that the 1st defendant did not enter any appearance and neither has the 1st defendant filed any objection to the order sought by the plaintiff. It should be noted that the purchasers of the private Lots 143, 144 and 236 were made after the memorandum of charge was executed.

The issue before me is whether I should make the order of sale of the land or otherwise in the face of the claim of the 2nd to 5th defendants of their interests as purchasers of Lots 143, 144 and 236. As no subsidiary titles were issued yet, the interests of the 2nd to 5th defendants remained unregistered. From the number of authorities cited and relied on by Counsels, it would appear to me that the facts of the present case are substantially different from those authorities cited. However, it is clearly established in law that upon registration of a charge the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. (See *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] CLJ (Rep) 387). No doubt *Tai Lee's* case is in respect of the provisions of the National Land Code 1965 whereas over here we have the Sarawak Land Code but an examination of the wordings of s. 132 of the Land Code (Cap 81) and s. 340 of the National Land Code 1965 though they are not the same, in my view, the legal effect cannot be said to be different. In that event, a passage from *Tai Lee's* case may be relevant when Abdul Hamid FJ (as he then was) said at p. 391:

> The principle underlying the provision of our National Land Code particularly on the effect of registration effecting the title or interest of a registered proprietor is basically similar to that set out in *Waimiha Sawmilling Company Limited v. Waione Timber Company, Limited* [1926] AC 101, at p. 106 cited from a passage in the Court of Appeal case of *Fels v. Knowles* 26 NZLR 604, at p. 620 as follows:

> The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

Now, whether fraud exists is a question of fact to be decided upon the particular circumstances of each particular case. To quote Abdul Hamid FJ (as he then was) in *Tai Lee's* case "The law is clear that the onus is upon the respondents to prove beyond reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud". To prove fraud the Court must be satisfied that the circumstances in which the plaintiff obtained registration of the charge was such that they constituted actual fraud. The onus is on the 2nd to 4th defendants to establish actual fraud of the chargor (1st defendant) to which the plaintiff was a party or privy and it ought to have been committed prior to or at the time of the registration of the charge. The actual fraud complained of must be that which resulted in registration of the chargee i.e., the fraudulent party (see p. 392 of *Tai Lee's* case, *supra*). The factual situation in this case is that the charge was registered well before the time of the purchasers of the lots in question by the 2nd to 5th defendants. At most the plaintiff and the 1st defendant should be able to anticipate that there will be purchasers of various lots in Kuching Plaza for which end-financing is required and that is about all and surely it cannot be said that actual fraud was perpetrated by the plaintiff or the 1st defendant in connivance with the plaintiff.

As actual fraud is not established in this case there is nothing to prevent the plaintiff from obtaining an order of the Court for sale. Though such an order may appear to cause undue hardship to the 2nd to 5th defendants in terms of their investments in the said lots but in my view, the circumstances of the case do not justify the Court to refuse relief simply because it feels sorry for the 2nd to 5th defendants or even if it regards the lender (the plaintiff) as arrogant, boorish or unmannerly. (See *Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Anor*. [1989] 1 CLJ (Rep) 1.

In my opinion the 2nd to 5th defendants are not without remedy in the event an order for sale of the land is made as they have a recourse to take by going after the 1st defendant for breach of contract by failing to obtain a subsidiary title to their respective lots. Whether they succeed in getting back their investments against the 1st defendant is a totally different issue altogether in so far as this originating summons is concerned.

In the circumstances of the case I would make an order for the sale of the land as prayed by the plaintiff and would order that the 1st defendant do pay the costs of the proceedings. It would not be fair in my view to order the 2nd to 5th defendants to pay the costs as I believe that they took the action in this case in the honest belief that their interests should be protected though it turned out to be erroneous.

Also found at [1990] 2 CLJ 618